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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

DOMINIC LEBLUE,

Defendant and Appellant.

2d Crim. No. B200642
(Super. Ct. No. NA068227-01)
(Los Angeles County)

Dominic LeBlue appeals a judgment entered following his conviction of two counts of residential burglary and three counts of residential robbery. (Pen. Code, §§ 459, 211.)[1] We strike the one-year enhancement imposed pursuant to section 667.5, subdivision (b), order a correction of the abstract of judgment in several respects, and otherwise affirm.

FACTS AND PROCEDURAL HISTORY

Chavez burglary and robberies

(Counts 1, 5, 6, 7)

In the early morning of November 24, 2005, Rafael, Socorro, and Gloria Chavez were awakened in their Long Beach residence by an intruder. Rafael turned on the bedroom light and saw LeBlue. Family members physically struggled with LeBlue but he broke free and fled from the home. Distinctive jewelry, 10 $2 bills, and other monies were missing from the women's purses.

[1] All further statutory references are to the Penal Code.

Within 30 minutes, police officers found LeBlue. He possessed jewelry and currency which Chavez family members later identified as belonging to them. Fingerprints found on a window frame and in the kitchen of the Chavez home matched LeBlue's fingerprints.

Several days later, Long Beach Police Officer Jennifer Valenzuela interviewed LeBlue and informed him of his constitutional rights pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436. LeBlue waived his constitutional rights and admitted entering the Chavez home to take money.

Ojeda burglary

(Count 3)

In the early morning of May 7, 2005, Juan Ojeda and his family were staying at a residential motel in Long Beach. Ojeda noticed that someone closed and locked the interior door to the kitchen of his unit. He opened an outside door to investigate and saw two men leave. The window screen lay on the ground. Ojeda returned to the unit and noticed that his son's watch was missing.

During the police interview with Officer Valenzuela, LeBlue admitted removing the window screen. He stated that his companion then entered Ojeda's room and took property.

Trial and sentencing

The jury convicted LeBlue of two counts of first degree residential burglary and three counts of first degree residential robbery. (§§ 459, 211.) In a separate proceeding, the trial court found that LeBlue suffered a prior serious felony conviction for robbery and served a prior prison term therefor. (§§ 667, subd. (a), 667, subds. (b)-(i), 1170.12, subds. (a)-(d), 667.5, subd. (b).) The trial court sentenced LeBlue to 26 years in prison, consisting in part of a doubled, upper six-year term for the Ojeda burglary plus a five-year enhancement pursuant to section 667, subdivision (a) (17 years). In sentencing LeBlue to the upper term, the trial judge stated that he chose the upper term "because [LeBlue's] prior performance on parole has been just awful." The court then imposed subordinate and consecutive sentences for counts 5, 6, and 7. It imposed and stayed sentence for the Chavez

burglary, pursuant to section 654. The court also imposed a court security fee, a restitution fine, and stayed a parole revocation restitution fine. It awarded LeBlue 681 days of presentence custody credits.

LeBlue appeals and contends that the trial court erred by applying an upper term sentence based upon a factor neither admitted nor found true by the jury. (*Cunningham v. California* (2007) 549 U.S. 270, 274.)

DISCUSSION

LeBlue argues that imposition of the upper term violates his federal constitutional rights to jury trial, to proof beyond a reasonable doubt, and to due process of law as interpreted by the United States Supreme Court in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490, *Blakely v. Washington* (2004) 542 U.S. 296, 303, and *Cunningham v. California, supra*, 549 U.S. 270, 274-275.

LeBlue adds that application of the March 30, 2007 amendment to section 1170, subdivision (b), violates the federal and state constitutional prohibitions against ex post facto laws. He asserts that the amendment establishes a new "statutory maximum" of an upper term, thereby inflicting greater punishment for his earlier crimes. LeBlue contends that the 2005 version of section 1170, establishing a presumptive middle term sentence, governs his punishment. To preserve further review, he asserts that judicial decisions holding otherwise are wrongly decided. (*People v. Sandoval* (2007) 41 Cal.4th 825.) LeBlue also claims application of the amendment denies him equal protection of the law.

In *Cunningham v. California*, *supra*, 549 U.S. 270, the United States Supreme Court held that the California sentencing scheme pursuant to former section 1170 violated the Sixth Amendment jury trial guarantee. Former section 1170 provided a determinate sentencing scheme comprised of a lower, middle, and upper term, with a required imposition of the middle term unless the court found aggravating or mitigating factors. *Cunningham* deemed the middle term the "statutory maximum" term. (*Id.* at p. 288.) It proscribed a sentencing scheme permitting a court to impose a higher sentence based upon a fact, other than a prior conviction, not admitted by the defendant nor found true by the jury. (*Id.* at pp. 274-275.)

In response, the Legislature amended section 1170, effective March 30, 2007. (Stats. 2007, ch. 3, § 2.) The amendment provides that the middle term is no longer the presumptive term absent aggravating or mitigating factors, and the trial court has the discretion to impose an upper, middle, or lower term based upon its stated reasons. Section 1170, subdivision (b) provides: "When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the choice of the appropriate term shall rest within the sound discretion of the court. . . . The court shall select the term which, in the court's discretion, best serves the interests of justice. . . ."[2]

In *People v. Sandoval*, *supra*, 41 Cal.4th 825, our Supreme Court rejected a similar ex post facto and due process contention and concluded that "the federal Constitution does not prohibit the application of the [amended section 1170] revised sentencing process . . . to defendants whose crimes were committed prior to the date of [this] decision . . . ." (*Id.* at p. 857.) *Sandoval* reasoned that removing the presumption of a middle term in the absence of aggravating or mitigating factors is not intended to and would not be expected to increase the sentence for any particular crime. Moreover, any difference in the amount of discretion exercised by the trial court in selecting an upper term under the former and present versions of section 1170, subdivision (b) is "not substantial." (*Sandoval*, at p. 855.)

Here the trial court sentenced LeBlue on July 10, 2007, approximately three months after the effective date of the amendment to section 1170, subdivision (b). The applicable law at sentencing was the amended statute. The trial court selected the upper term and stated its reason as LeBlue's poor performance on parole. The trial court complied with section 1170, subdivision (b), and did not violate LeBlue's constitutional rights. (*People v. Sandoval*, *supra*, 41 Cal.4th 825, 857; *Auto Equity Sales v. Superior Court* (1962) 57 Cal.2d 450, 455; *People v. Wilson* (2008) 164 Cal.App.4th 988, 992.)

During the briefing in this appeal, our Supreme Court decided *People v. Towne* (2008) 44 Cal.4th 63, 70-71, holding in part that the constitutional right to jury trial

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[2] The Legislature further amended section 1170, subdivision (b), effective January 1, 2009. That amendment is not applicable here.

does not extend to a factual finding that defendant was on probation or parole at the time of the offense. Here LeBlue suffered three violations of his parole for a 1997 robbery conviction, but was not on parole at the time he committed the present criminal offenses. Moreover, the probation report does not state the reasons his parole was violated on two occasions. It states a third violation occurred by an arrest that did not lead to a criminal conviction. Thus *Towne* is not pertinent here. (*Id.* at pp. 82-83 ["In circumstances in which a finding of poor performance on probation or parole can be established only by facts other than the defendant's prior *convictions*, we conclude that the right to a jury trial applies to such factual determinations"].)

During sentencing, the trial court misspoke when it stated that count 1 was the principal term, and count 3 was stayed pursuant to section 654. The reporter's transcript is clear that count 3, the Ojeda burglary, was made the principal term, and count 1, the Chavez burglary, was stayed pursuant to section 654. In addition, the trial court erred by imposing a one-year enhancement pursuant to section 667.5, subdivision (b). (*People v. Jones* (1993) 5 Cal.4th 1142, 1152-1153.)

We modify the judgment by striking the one-year prior prison term enhancement. We order the trial court to amend the abstract of judgment and forward the amended abstract to the Department of Corrections. The judgment is otherwise affirmed.

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

COFFEE, J.

PERREN, J.

Arthur Jean, Jr., Judge

Superior Court County of Los Angeles

Rachel Lederman, under appointment by the Court of Appeal, for Defendant and Appellant.

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